FILE COPY

Office Supreme Court,
FILED
FEB 23 1935
CHARLES ELMORE CROPLEY
CLERK

No. 544

In the Supreme Court of the United States

OCTOBER TERM, 1934

HARRY BERGER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLANT

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statement	1
A.—The Indictment	2
B—The Testimony	2
Specification of Errors	3
Argument	6
Summary	7
I.	7
II.	8
III.	18
Conclusion	24
Appendix:	38
Statutes	40
Testimony	42

CITATIONS

Cases:	
Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334	38
Caminetti v. U. S., 242 U. S. 470	21
Crawford v. United States, 212 U. S. 183	38
Deery's Lessee v. Cray, 5 Wall. 795	38
Dowdy v. United States (C. C. A. 4) 46 F. (2d) 417, 423	11
Funk v. United States (C. C. A. 4), 46 F. (2d) 417, 423	11
Gilmer v. Higley, 110 U. S. 47	38
Graves v. United States, 150 U. S. 118	24, 37
Hall v. United States, 150 U. S. 76	24, 37
Heyman v. Reg. 8 Q. B. 102, 28 L. T. N. S. 162, 21 W. R. 357, 12 Cox, C. C. 383, 8 Eng. Rul. Cas. 126	13
Holmgren v. United States, 217 U. S. 509	22
Johnson v. United States, 131 C. C. A. 613	37
Lilienthal v. United States, 97 U. S. 237	21, 22
Marcante et al. v. United States, (C. C. A. 10) 49 F. (2d) 156	9, 13
Moores v. Citizens' National Bank, 104 U. S. 625	38
O'Connell et als. v. Reg. (1844), 11 Cl. and Fin. 155, 3 L. T. O.,S. 429, 9 Jur. 25, 1 Cox. C. C. 413, 8 E. R. 1061	17
Parnell v. United States (C. C. A. 10) 64 F (2d) 234	10
People v. Esposito, 224 N. Y. 370	24
People v. Malkin, 250 N. Y. 185	24
People v. Slover, 232 N. Y. 264	24
Pettibone v. U. S., 148 U. S. 197	13
Potter v. United States, 155 U. S. 438	21
Reg. v. Kenrick, 5 Q. B. (Eng.) 49, Dav. & M. 208, 12 L. J. Mag. Cas. N. S. 135, 7 Jur. 848	13
Reg. v. Manning (1883) 12 Q. B. D. 241	18
Reg. v. Quinn (1898) 19 Cox C. C. 78	18
Smith v. Shoemaker, 17 Wall. 630	38
State v. Kardin, 2 Dev. & B. (N. C.) 407	22
Sykes v. Barraclough (1904) 2 K. B. 675	18
Sykes v. United States, 204 F. 909	22
Telman v. United States (C. C. A. 10) 67 F. (2d) 716	10
Terry v. United States (C. C. A. 9) 7 F. (2d) 28	12,
Tinsley v. United States (C. C. A. 8) 43 Fed. (2d) 890	1
United States v. McConnell 285 F. 164	10
United States v. Murphy, 252 F. 404	2
United States v. Siebrecht (C. C. A. 2) 59 F. (2d) 976	12
United States v. Wills (C. C. A. 3) 36 F. (2d) 855	1
Wilson v. United States, 149 U. S. 60	24, 37
Wyatt v. United States (C. C. A. 3) 23 Fed. (2d) 791	11
Miscellaneous:	
16 Corpus Juris, 1143	36
26 Ruling Case Law 1022	36
3 Wigmore Evidence 837, 850	37
4 Wigmore Evidence 350-372	2

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 544

HARRY BERGER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The trial court's charge to the jury appears at R. 656-695. Otherwise, the United States District Court for the Eastern District of New York wrote no opinion.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 752-755) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1934 (R. 756). Jurisdiction of this Court was invoked under Section 347 (a) of Title 28, United States Code (Judicial Code, Section 240 as

amended by the Act of February 13, 1925). The petition for a writ of certiorari was filed in this Court on November 26, 1934. A writ of certiorari issued out of this Court to the Circuit Court of Appeals on January 7, 1935.

STATEMENT

The appellant was convicted in the United States District Court for the Eastern District of New York on March 27, 1934, of a charge of conspiracy with seven co-defendants of whom two were found guilty and a third had pleaded guilty (R. 27-32, 696). The defendant was sentenced to be confined in a penitentiary or prison camp for the term of one year and one day (R. 968). The substantive counts of the indictment numbered 1, 2, 3, 4, 5, 6 had been dismissed by the Court. As to the substantive counts numbered 7 and 8, the appellant was found "not guilty". The judgment of conviction was affirmed by the Circuit Court of Appeals on November 13th, 1934.

A—The Indictment

The indictment consisted of nine counts. The first eight charged substantive violations of Sections 263 and 265 of the United States Code, Title 18. The first six counts charged uttering and passing counterfeits of notes issued by the Federal Reserve Bank of Dallas, Texas (R. 4-22). The seventh and eighth counts charged a like offense with reference to counterfeits of an issue of the Federal Reserve Bank of Chicago, Illinois (R. 22-27).

The ninth count charged a conspiracy: "that the defendants did unlawfully, wilfully and corruptly combine, conspire and confederate and agree together • • • with intent to defraud, to possess and keep in their possession and conceal with intent to utter, publish, and

pass the same * * * falsely made, forged and counterfeited" notes in the denominations of $20 and $100 "knowing that the said circulatory notes * * * were falsely made, forged and counterfeited, and intending then and thereby to defraud divers persons" (R. 27-29).

B—The Testimony

The record of the testimony is quite voluminous. Comparatively little of it directly involved the appellant. The mass of it, however, so colored the trial, and the error was so continuous that the entire testimony appears in the transcript. For the purpose of argument, a short summary of the facts in a manner most favorable to the respondent should be sufficient (while a complete analysis of the evidence is set forth infra pp. 42-58.

JACK KATZ, an alleged co-conspirator who had turned State's evidence, testified that he met the defendant Rice, whom he had known at Sing Sing (R. 137, 139). Rice told him he had an idea whereby they could make some money buying jewelry from people who advertised in the newspapers such jewelry for sale, paying therefor with counterfeit money (R. 144-145, 166-170). He met Berger at the apartment of Miss Molnar and Miss Talle. Their first conversation was sometime in the latter part of December, before Christmas. Berger said that one of the girls told him that Katz had counterfeit money and asked to be shown the bills. Katz got one of the $100 bills and showed it to him. Berger said it looked pretty good. Before New Year's Day, Berger introduced Jones to him. Jones asked if he could give him a few of the bills. Katz called Berger aside and told him he did not know the fellow and asked what type of a man he was. Berger said he was O. K. and not to worry about him: Jones would never say anything. Katz spoke to Jones

who said he would pass the bills in hockey games in Madison Square. He could get rid of them on the bookies there (R. 158-159). The following night he came back there. Berger and the girls were also there. He gave Berger the four $100 bills as he did not want to hand them to Jones directly; Berger immediately turned them over to Jones and Katz received $100 (R. 160).

Two of these bills were passed by Jones (R. 54, 70-73). He admitted doing so, believing they were good. Jones testified that he had received those bills not from Berger but as his winnings on a bet from a bookmaker for whom Katz was a runner. That he had never been in the girls' apartment and had not met Katz through Berger (R. 406-408).

Godby and Kett, both secret service operatives, testified that, when first questioned, Berger had admitted taking Jones to the girls' apartment and introducing him to Katz (R. 243-244, 550-551). *No one but Katz had ever seen Berger with counterfeit money or heard of him passing it* (R. 267).

Katz, who was the main witness and himself the really active wrongdoer, had a record of five previous convictions:

> On September 5, 1921, as Harry Katz, Atlantic City, New Jersey; larceny, sentence suspended; on September 17, 1923, as Harry J. Katz, Atlantic County, New Jersey; grand larceny, indefinite term, Rahway, New Jersey State Reformatory, as Jack Pearce in 1932, no date, Holmesburg, Pennsylvania; larceny, sentenced to one year; on April 5, 1926, as Harry Katz, Los Angeles, California; forgery, three years probation. On April 18, 1929, attempted forgery, five years in State's prison, by Judge Rosalski (R. 180-186, 505).

Katz too had boasted: "I was arrested in every city" (R. 173). He had received a promise from the Assistant United States Attorney that "if Katz would testify truthfully, that *I would gauge that truthfulness by his testimony heretofore given in various places* . . . " then the eight substantive counts against Katz would be dismissed and a plea to the conspiracy count would be accepted; and Katz would be protected from the other defendants (R. 132-133). Thus the maximum penalty to which he would be subject was reduced from 122 years imprisonment and $50,000 fine to 2 years imprisonment and $10,000 fine (R. 176).

He first informed the Secret Service men that he had dealings with Berger on January 15th. This was after Berger had gone to the girls' apartment about 4 o'clock in the morning and found him there with another man (R. 202). He stopped being friendly with Berger the night that Berger broke into the apartment when he, the witness, was there with another man (R. 220). The other man opened the door after Berger had been pounding on it for a few minutes (R. 221). *He is not friendly with Berger and does not feel very good towards him* (R. 223). *He did not deny giving a message to an attorney, to carry to Harry Berger's attorney, saying he was sorry he brought Berger into it; that he knew Berger was not guilty* and he did it because he was sore at him and thought he was fooling around with his wife (R. 207). Upon examination by the Court, he admitted that Commissioner O'Neil stated he was crazy (R. 212).

Katz had also told the bondsman after the arraignment that Berger had nothing to do with the case and was innocent (R. 542, 547).

BERGER denied that he had ever had anything to do with any counterfeit bills. He showed that he was in

the real estate business, managing large properties, handling large sums of money for his principals and financially comfortable (R. 329-330). He met Katz and the latter's wife at the girls' apartment but never had any dealings with him (R. 331). When he found out Katz was an ex-convict, he told Miss Talle to keep Katz from the apartment (R. 331, 336). He never knew Katz was handling counterfeit money (R. 337). He never knew Jones to have been at the girls' apartment (R. 357) nor did he know that Katz and Jones were acquainted (R. 367).

Berger had known Jones because he ate at a luncheonette operated by Jones. He had tried, as broker, to aid Jones in the purchase of a concession (R. 327, 337, 338).

Berger admitted that ten years before, when only twenty years old, he had pleaded guilty to a charge of robbery (R. 325). For the succeeding ten years he had led an exemplary life, and nine witnesses (lawyers, brokers, an accountant and a former State Senator) testified to his good reputation and character (R. 285-324).

SPECIFICATION OF ERRORS TO BE URGED

(1) The Circuit Court erred in holding contrary to decisions of other Circuit Courts that the variance between the indictment and the proof was not material.

(2) The Circuit Court erred in holding that the misconduct of the prosecuting attorney permitted and condoned by the Trial Judge, while an abuse which should have been strictly controlled, was not prejudicial to the defendant.

(3 The Circuit Court erred in affirming a judgment based upon evidence admittedly "not strong", without proper corroboration of the testimony of the discredited and unreliable co-conspirator and where throughout the

trial the prosecuting attorney had misconducted himself so as to deprive the defendant of the fair trial to which he was entitled.

ARGUMENT

Summary

From the proof and as the Circuit Court below agreed, two separate conspiracies, distinct from the single one alleged in the indictment were proven. The court below held that immaterial. Such a stand is however contrary to the weight of authority and the holdings of five other circuits. It also appears to be inconsistent with a previous decision of the court below.

Such a variance has been held by the other courts to result in a total failure of proof of the crime charged. The lower court should then have reversed the conviction and the trial court have directed a verdict of acquittal.

It appears also that the proof adduced by the prosecution was so weak as not to satisfy the standard set by the weight of authority in criminal cases. Further while the proof was weak it came only from the lips of a discredited and concedely unreliable co-conspirator and there was a total failure of corroboration. This resulted in an error of law which should be rectified.

The trial court in the instant case also permitted and condoned actions upon the part of the prosecuting attorney which prejudiced the defendant and prevented him from securing a fair and impartial trial. This taken into consideration with the obvious failure of proof explains the reason for the conviction of the defendant.

The course of the trial sanctioned by the Circuit Court

was so contrary to the usual and proper course of trial procedure that this Court's power of supervision should be exercised to rectify the error. The injustice of permitting the judgment below to stand will appear clear.

I.

The indictment charges an agreement among and between all of the defendants and other unknown persons to utter and pass the counterfeit notes. Katz pleaded guilty and Rice, Jones and Berger were found guilty of it. To sustain the verdict it must be considered then, that all were acting in concert. The proof discloses a different situation, however.

Katz testified to the purpose or plan: he and Rice were to buy rings from people who had advertised them in the papers, and to pay for them with counterfeit bills (R. 153). That was the sole conspiracy according to the Government's main witness. Jones and Berger did not have any part.

If the facts alleged by the prosecution are considered in the light most favorable to the Government, it appears that Katz, Berger and Jones were engaged in a distinct and separate enterprise, the object of which was to permit Jones to pass some of the bills in an undetermined manner (R. 158-159). No matter how the facts are scrutinized it is impossible to connect Rice with Berger. The evidence does not show any mutual plan or understanding between Rice and Berger, nor that their minds met to pass the bills as alleged in the indictment. True, it may be taken that conspiracy has been proven. But it becomes obvious that there must have been two conspiracies: (1) the agreement between Rice and Katz; (2) the agreement between Katz, Berger and Jones.

The Circuit Court below agreed:

> "As we have said, the original arrangement was between Katz and Rice, and contemplated a limited use of the bills; that is, to buy rings. When Katz engaged Jones through the intervention of Berger, it was to pass the bills to tradesmen, and Rice knew nothing of it. Nor did Berger or Jones know that Katz was associated with Rice, though Jones was acquitted with Rice. So far as they knew, Katz might have got the bills from anyone. Thus the evidence really showed two separate conspiracies one of Katz and Rice, the other of Katz, Berger and Jones, with no connection except that Katz was a common member to both schemes, and that both concerned the utterance of the same bills. The question is whether it was error not to dismiss the case for a material variance, as Berger's attorney moved at the close of the evidence" (R. 753).

The Court held this variance not material, stating:

> "* * * It is indeed no answer to a bad practice to say that worse is tolerated already, but it is something to remember that in trials for this crime the latitude is wide. At any rate we are not content to dispose of the cause by the absolute doctrine that appears to have been accepted elsewhere; we believe that the error must be such as to 'affect the substantial rights of the parties'. (Sec. 391, Title 28, U. S. C.)" (R. 754).

The rule is otherwise in every circuit which has passed upon the question. In fact a variance of the type here found has always been considered a failure of proof.

In *Marcante et als.* v. *U. S.* (C. C. A. 10) 49 Fed. (2d) 156, 158, numerous defendants were charged with conspiracy to violate the National Prohibition Law. The Court said:

> "The difficulty is that the proof discloses nothing except one group conspiring with Irving to sell liquor in one locality; another group conspiring with Irving to manufacture liquor in another. Two conspiracies not alleged are proven, and there is no proof of the single conspiracy alleged."

The same principle was reiterated by the same Court in *Parnell* v. *U. S.* (C. C. A. 10) 64 F. (2d) 324, and *Telman* v. *U. S.* (C. C. A. 10) 67 Fed. (2d) 716, 718. In the latter case, the Court distinctly said:

> "Where one large conspiracy is charged, proof of different and disconnected smaller ones will not sustain a conviction."

In *Tinsley* v. *U. S.*, 43 Fed. (2nd) 890, (C. C. A. 8), the indictment charged conspiracy to steal horses. The proof showed that Tinsley had acted with Paul Widow and Philip Lone Eagle and that each had stolen horses pursuant to arrangement with Tinsley. The Court held that such proof disclosed two separate and distinct conspiracies and not the single conspiracy charged in the indictment; and that the verdict against Tinsley could not be sustained.

Similarly in *U. S.* v. *McConnell*, 285 F. 164, the Circuit Court of Appeals for the Eighth Circuit said:

> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar purpose in view and that each of four groups of persons were cooperating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

And in *United Sttaes* v. *Wills*, 36 Fed. (2nd) 855, 859, the Circuit Court of Appeals for the Third Circuit said:

> "* * * when the government by the first indictment charged one conspiracy and proved others it did more than fail to prove the conspiracy charged; it proved other conspiracies not charged and thus created a variance which was complete in the technical sense and material in the sense of the law."

The same court had well and vigorously stated in *Wyatt* v. *United States*, 23 Fed. (2d) 791:

> "Having a responsibility for the enforcement in this circuit, not only of the National Prohibition Law, but of federal laws generally, we are strongly of opinion that the conspiracy statute should not be stretched to cover and be misused to convict for offenses not within its terms, and that, when resorted to, the conspiracy alleged must be proved as charged. When, as here, one large conspiracy is specifically charged proof of different and disconnected smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. *Terry* v. *United States* (C. C. A.) 7 F. (2d) 28, 30; *United States* v. *McConnell* (D. C.) 285 F. 164, 166."

In *Dowdy* v. *United States*, and *Funk* v. *United States* (C. C. A. 4) 46 F. (2d) 417, 423, the indictment alleged a conspiracy between all the defendants, and one Martin to violate the National Prohibition Act. The proof disclosed that Martin and Dowdy acted together and Martin and Funk worked in concert. The court held that Dowdy's conviction should not be sustained for (one reason) he

was convicted of a conspiracy separate and distinct from the conspiracy charged.

Similarly in *Terry* v. *United States* (C. C. A. 9) 7 Fed. (2d) 28, it was pointed out that the proof and not the indictment is the determining factor as to the crime. While both crimes proven may come within the scope of the indictment, the broad terms of the indictment setting forth but a single conspiracy cannot be deemed to embrace the similar yet different crimes proven. "The scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it."

Thus we see the Circuit Courts for the Third, Fourth, Eighth, Ninth and Tenth Circuits clearly opposed to the decision of the lower courts herein. Strangely enough the Court below has handed down a decision in *U. S.* v. *Siebrecht et al.* (C. C. A. 2) 59 F. 976, which is not only consistent with the rules of the other circuits but opposed to its own decision herein. True the cases may be distinguished by showing that one of the conspiracies proven in the Siebrecht case had been barred by the Statute of Limitations, but the distinction is artificial. In the within case the Circuit Court dd thus attempt to reconcle its decisions, claiming that the variance was material in the Siebrecht case because of the bar of the Statute. It is interesting to note, however, that in deciding that case, the Court did not base its view of material variance upon the bar of the statute. After having shown that a single conspiracy had been alleged and two proven the Court unqualifiedly said:

> "There was, we are persuaded, a failure of proof of the single conspiracy alleged, which amounted to a fatal variance."

In no part of its opinion in that case did the Court even hint that because of the Statue of Limitations the variance was prejudicial. In fact it adopted the view of the other Circuits Court (see *Terry* v. *United State, supra,* and *Marcante* v. *United States, supra*) that the variance resulted in a failure of proof when it held:

> "Thus the Court relied wholly upon a single conspiracy of which we think there was insufficient proof."

The decision of the court below on this point is therefore inconsistent with its own previous decision as well as in conflict with decisions of five other courts of even jurisdiction.

The basis of every conspiracy is the agreement to do an unlawful thing or an innocent thing in an illegal manner. To constitute the offense at common law the joint evil intent alone was necessary. *Reg.* v. *Kenrick,* 5 QB. (Eng.) 49, Dav. & M. 208, 12 L. J. Mag. Cas. N. S. 135, 7 Jur. 848; *Heyman* v *Reg.,* 8 QB. 102, 28 L. T. N. S. 162, 21 W. R. 357, 12 Cox, C. C. 383, 8 Eng. Rul. Cas. 126. Under the statute involved "the confederacy to commit the offense is the gist of the criminality." *Pettibone* v. U. S., 148 U. S. 197. The unlawful agreement is the essential feature of the crime. Such, like all agreements, necessitates a meeting of the minds of the contracting parties. True, such agreement need not be characterized by any oral or written expression of consent. It is needless to say, however, that some definite proof of such mutual understanding is necessary. If two parties to the supposed plan have one purpose and three others have an entirely different purpose, it would be almost fatuous to declare that the five were working in harmony. By any normal view of the situation one must

concede that there are presented two separate compacts.

So here in the instant case, the defendant was charged with conspiracy to utter counterfeit bills. The proof showed at best a conspiracy between Rice and Katz to defraud owners of jewelry by buying their goods, with counterfeit bills; and an alleged conspiracy between Katz, Berger and Jones to sell Jones counterfeit bills to pass in an uncertain manner. Both may be unlawful conspiracies and both may come within the general category of the charge of the indictment. But their distinctiveness is apparent. The latter arrangement had no connection with the first except that Katz was a party to both. The original agreement contemplated nothing which could involve anyone but Rice and Katz. A conspiracy where no definite agreement is proven, may be inferred from the facts, but in this case the terms of the unlawful agreement were explicit—they did not depend on inference. It cannot then be extended to cover facts other than those consistent with the expressed purpose unless some proof of an agreed extension of the plan is offered. It follows that there could have been no meeting of the minds of Rice, Katz, Jones and Berger (either expressed or inferred). There being no mutual plan and purpose there could be no conspiracy as charged. Thus the indictment falls.

It has been claimed that the appellant was not prejudiced by the variance between indictment and proof, although it is admitted that "the evidence of Katz's trafficking with Rice was incompetent" (R. 755). Returning to the indictment we find that the prior counts involved only Katz and Rice (R. 4-22); and of the five overt acts charged in the conspiracy count (ninth) at least three had no connection with Berger (R. 29-32). Naturally, the greater portion of the testimony had abso-

lutely no legal relation to Berger, concerning itself with Rice. Of course the jury was cautioned not to consider all of the testimony as against Berger, but one knows that no jury can adhere to such an injunction.

Without question, the cumulation of improper acts proven either on the substantive counts or as overt acts of the alleged conspiracy was so overwhelming as to burden the triers of the fact, and make impossible the tracing of each act to its particular source and to its relevant portion of the indictment. The very volume, of what must be deemed irrelevant testimony, alone would serve to becloud the particular issue regarding Berger and prevent the jury—even if it willed otherwise—from obeying the charge. Why the Circuit Court, itself, must have been guilty of the same error! It said: "His (Berger's) association with Rice, even if Rice was a proven counterfeiter, did not taint Berger (R. 755). Yet there is not one word of testimony in the case to show that Berger ever associated with Rice, even met him, or ever knew of his existence.

The Circuit Court also said, "Jones was acquainted with Rice" (R. 753) although there is not one word of proof to that effect. In fact the evidence is to the contrary: that Jones had never seen Rice in his life (R. 409).

The Circuit Court has said that through this double proof, Berger benefitted because Rice testified (in effect) in the former's behalf (R. 755). Quite evidently, however, the jury did not believe Rice for it found him guilty on the seventh and eighth of the substantive counts in the indictment as well as the conspiracy count. It must be remembered too that the testimony with regard to the appointment at Roth's Restaurant including the alleged telephone conversation between Rice and Katz and the discussions in the restaurant itself (infra, pp. 46- 48) though not involving Berger offered some corroboration

of Katz. None of it had anything to do with the supposed conspiracy between Berger, Jones and Katz. It concerned only Rice. Yet it was proof of a conspiracy. The net result was that on Rice's denial of the incriminating substance of the telephone conversation and restaurant discussion, the jury refused to believe him on other matters. His testimony was then in the nature of a boomerang for instead of aiding Berger it must have injured him.

It is difficult to believe an absence of injury. The proof of the conspiracy concerning Berger was admittedly weak. Yet there is full, complete and strong proof of the substantive acts including those designated by the Grand Jury as overt acts. One cannot be so naive as to believe that the jury could be unaffected by the weight of that proof. In fact, after an analysis, one groping for the proof of the conspiracy alleged, must decide that it is based entirely on the proof of the numerous though unrelated affirmative acts done by Rice and Katz alone.

Another interesting point is presented. If Berger took part in the conspiracy then he was also guilty of counts 7 and 8 as an accomplice, just as guilty as Rice. Even the Court so charged:

> "Now, coming right to the point, if Berger did not give the money to Jones, then Berger did not commit this substantive crime that is charged here of aiding and abetting, because it isn't charged that Berger actually passed the money to this Berger, the tailor, it isn't charged that he passed the money to the woman Goldstein. It is charged that he aided and abetted by giving to Jones the money which Jones passed, and therefore he aided and abetted."

But inconsistently the jury found Berger not guilty on those counts.

The inference is irresistible, that the jury, in the same manner as the trial court failed to comprehend the distinction between the acts of Rice and Katz, and those of Katz and Jones allegedly involving Berger.

One must not neglect also, the all too probable result that Berger might be indicted jointly with Katz and Jones for an alleged conspiracy to pass, utter, etc., counterfeit bills (based upon the alleged sale of the bills by Katz to Jones through Berger). On the basis of the indictment at bar, double jeopardy could not be claimed. The allegations of the indictments would be distinct and the proof would be similar only in respect to the events transpiring at the girls' apartment. But as to that similarity, it may well be argued that such proof in the case at bar was solely for the purpose of proving that Berger had been a party to the greater conspiracy.

Only by an extremely narrow view of the testimony can one say that the appellant was not prejudiced. Yet no extended argument is necessary to illustrate the danger of the adoption of the rule of the Circuit Court below. Approval of that rule would permit a trial court to hold in any case that the variance was immaterial although one crime was charged and two totally distinct and separate ones were proven. The result is not very far from a ruling that the indictment need not charge the crime to be proven against an accused as long as it charges a crime.

What then becomes of the constitutional declaration of the Fifth Amendment? It is transformed into a vain injunction to which obeisance is rendered in formality only; its principles honored only in their breach.

Even in Great Britain where no such constitution as ours gauges judicial determination, we find the advocated rule sustained. Almost one hundred years ago in the case of *O'Connell et als.* v. *Reg.* (1844), 11 Cl. & Fin. 155, 3 L. T. O. S. 429; 9 Jur. 25; 1 Cox, C. C. 413; 8 E. R.

1061; the defendants had been charged with a general conspiracy to do several unlawful acts. The jury found all eight guilty of conspiracy to effect the first of the purposes, three guilty of seeking to accomplish the second group, and four guilty of a plan to perpetrate the balance. The House of Lords reversed the judgment after a plea that the defendants were found guilty by the jury of three separate conspiracies although only one was charged.

The rule has been consistently followed. *Reg.* v. *Manning* (1883), 12 Q. B. D. 241; *Reg.* v. *Quinn* (1898), 19 Cox C. C. 78; *Sykes* v. *Barraclough* (1904), 2 K. B. 675.

Precedent, the weight of authority, and reason dictate the conclusion that the crime charged was not proved and the variance resulting is both material and prejudicial.

II.

The main facts in the testimony involving Berger have been set forth herein (*supra*, pp. 3-6). They have, however, there been stated in a manner most favorable to the respondent. Still it must appear obvious that the proof against Berger was extremely weak, even if credible. The Circuit Court admitted "that the case against Berger was not strong" and that the proof "depended chiefly upon the testimony of Katz, who turned State's evidence against the rest, who had been several times convicted of other crimes, and who was a *thoroughly unreliable person.*" (Italics ours.) (R. 753.)

Katz—the thoroughbred criminal, the man who had been arrested in every city, who had been convicted five times previously, the one really active in passing the counterfeit bills and guilty on all nine counts, the witness who admittedly bore a grudge against Berger, the squealer who furnished information to save his own hide,

the guilty one who was to receive at most a sentence of two years (if he testified in a manner satisfactory to the Assistant United States Attorney), instead of a possible one hundred and twenty. He was the only real witness against this defendant. (*infra* pp. 45-47).

And what was the story that he fabricated with a mind intent on revenge? That Berger had received the notes from him and at the same instant turned them over to Jones. Not that Berger was to pass the notes. Not that Berger was in any respect to profit from the transaction. Not that Berger had anything to do with counterfeit bills at any time other than to see that Jones got them.

Does it not seem ridiculous that Berger, who was attempting to forget his previous conviction by leading an exemplary life, should even touch the things? If he were to get something out of it, it might be more logical. If he were hard pressed and needed money, his connection with such an enterprise might be understandable. But that was not his condition. His business appeared to be prosperous, both in the brokerage and management lines; he maintained an expensive car and associated with rich and prominent people (infra, p. 50). The probabilities all point to the falsity of Katz's testimony.

The only other testimony against Berger was that of Godby. He testified that Berger admitted taking Jones to the girls' apartment. But Godby is the Secret Service operative who came down from Elmira at the call of his friend on the Daily News. That there were innumerable operatives close at hand was immaterial (R. 245-248). The feather was to be in Godby's hat, and he left no chance of losing that feather. His testimony shows it (R. 266, 569-582). He seemed willing to inject anything into his testimony. His over-anxiety got him into difficulty. Desirous of showing Berger to be an ex-

convict, he stated Katz met Berger in Sing Sing. His embarrassment was obvious when he was shown that Berger left Sing Sing four years before Katz got there and that while Berger was in prison, Katz was in California. He resorted to feigned poor memory. But his memory of statements by Berger seemed clear—all too clear. Yet although statements were taken from every single one of the other defendants, he took none from Berger. That fact alone arouses inquiry. None of the operatives or the Assistant United States Attorney made any effort to explain that, even though it was admittedly the custom to make statements. Kett sought to come to his aid on rebuttal, but his testimony cannot be considered of moment since he failed to connect Berger on the direct sase. (Infra, pp. 48-49, 57-58).

Yet taking their testimony at its face value, it still does not prove Berger guilty. What if he did introduce Jones to Katz? There is no proof that such introduction was for an insidious purpose, no hint that it was to aid the perpetration of a fraud.

Opposed to this equivocal testimony and Katz' obviously false statements we can pit the testimony on behalf of the defendant. Berger and Jones categorically and unequivocally denied Katz's allegations. Both clearly showed that Berger had not introduced Jones to Katz (R. 331, 337, 347, 408, 409). Jones showed the manner in which he had received the counterfeit bills (infra p. 55). A fine array of character witnesses proved the splendid reputation Berger had developed since his conviction (R. 285-324). Berger also showed how Katz had believed the defendant was fooling around with Mrs. Katz, and started to wreak his vengeance. He showed, too, how Katz, having found out this was error, was anxious to release Berger (infra, p. 53). We do not have to

accept Berger's statement on this alone. Herman Wasserberger, the bondsman, corroborated it (infra p. 57). But, better still, in Katz's admission that he didn't feel good toward Berger, and Godby's admission that Katz had first gone to the Daily News to press alienation of affection charges before proceeding with the counterfeiting charge (R. 223, 273).

It may well be asked, "Why, if Katz had agreed to withdraw his false accusation against Berger after realizing that Berger had nothing to do with his wife, did he persist in them at the trial?" The answer is all too clear. The Assistant United States Attorney said:

> "If Katz would testify truthfully, that *I would gauge that truthfulness by his testimony heretofore given in various places* * * *"

then Katz would receive certain consideration, as the dismissal of the substantive counts (R. 132). The Assistant United States Attorney was out to convict as many as possible, he did not desire to see Berger let off. Katz did not renege because he feared to renege—the extent of the consideration was at stake.

Can one then consider Katz's testimony of any value? Can one find in the combination of the testimony of Katz, Godby and Kett any proof, which, even overlooking the defense testimony, demonstrated the guilt of this defendant beyond a reasonable doubt?

Yet the law is well settled that a person accused of crime is presumed to be innocent until the contrary is proven, and that such guilt can only be shown by proof beyond a reasonable doubt.

> *Lillienthal* v. *U. S.*, 97 U. S. 237;
> *Potter* v. *U. S.*, 155 U. S. 438.

This Court has said (*Lillienthal* v. *U. S., supra*):

> "In all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment. *Com.* v. *McKie*, 1 Gray, 64; *Com.* v. *York*, 9 Metc., 125; *Com.* v. *Webster*, 5 Cush., 305; *Com.* v. *Eddy*, 7 Gray, 584; *Com.* v. *Wright*, Ben. & H., L. C. Cas., 229."

With the proof on the part of the prosecution remaining insufficient to overcome the presumption of innocence corroboration of Katz became important.

True, the early Common Law required no corroboration of the testimony of accomplices or conspirators. But the uncertainty and irresponsibility of such evidence was clear, especially where promises of immunity or favor were usually given. The general view then came to be that some corroboration was necessary. As early as 1838 we find it required in this country. (*State* v. *Kardin*, 2 Dev. & B. (N. C.) 407). Now at least half the States have enacted statutes making it imperative and the general rule seems to be that while a conviction may be sustained on the uncorroborated testimony of an accomplice, some corroboration is necessary. (4 *Wigmore on Evidence*, pp. 350-372.)

In *Holmgren* v. *U. S.*, 217 U. S. 509, 524, this Court said:

> "It is undoubtedly the better practice to caution jurors against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them."

In *Sykes* v. *U. S.*, 204 F. 909, the Court said:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime * * * And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition that another was an instigator or a participator in the perpetration of her crime is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke* v. *State*, 68 Neb. 154."

In the instant case, one may well look in vain for corroboration of Katz's testimony against Berger. No one, other than he, connected with Berger in any respect with the counterfeit bills. That his testimony is unreliable is clear. He admitted not feeling friendly toward Berger (R. 223). Three times he admitted Berger was innocent and stated that he would change his testimony accordingly (R. 207, 349, 542). From Godby's testimony, it seemed as if Katz was trying to charge Berger with alienation of affections (R. 273). That Katz was believed crazy by the Commissioner was recognized although Katz at first denied it (R. 212). That Katz had five times previously been convicted and once under an alias was admitted, although Katz at first had sought to conceal several of the convictions and had denied the alias (R. 135-136, 180-186, 505). That Katz had been promised what must be deemed excessive consideration must be recognized. In the place of a possible sentence of one hundred and twenty years, for testifying he was to receive at best two.

Can it be believed that Katz then left the stand un-

shaken and unassailed? The record discloses that he was completely discredited. Certainly then corroboration became not merely a cautious aid to the jury but an actual necessity. (*United States* v. *Murphy*, 252 Fed. 404.)

While admittedly the measure of credibility is for the jury to determine (*Caminetti* v. *U. S.*, 242 U. S. 470, 495) the obvious discrediting of the accomplice affected the sufficiency of the evidence and raised a question of law for the Court. It was incumbent upon the trial court to find that the absence of corroboration resulted in a failure of proof and it then became the duty of the court to direct a verdict of acquittal.

III.

Our system of jurisprudence has maintained one proposition as the beacon of our enlightment—that a defendant accused of crime is entitled to a fair and impartial trial. This has been scrupulously maintained by our appellate courts when individuals, always human, have by attack on public welfare become blinded to justice by the desire for vengeance in the name of public interest.

Graves v. *U. S.*, 150 U. S. 118;
Wilson v. *U. S.*, 149 U. S. 60;
Hall v. *U. S.*, 150 U. S. 76;
People v. *Slover*, 232 N. Y. 264;
People v. *Esposito*, 224 N. Y. 370;
People v. *Malkin*, 250 N. Y. 185.

That the prosecuting attorney in any case has much to do with the manner of conduct of the trial and that he can influence the atmosphere of such a trial is clear. That there is a burden upon the District Attorney as a

quasi-judicial officer to aid and maintain the proper judicial atmosphere and in doing so to prosecute the defendant solely on the facts of the case and by legitimate methods is well recognized. Improper questions, statements not based upon evidence, brow-beating of witnesses and excessive argumentativeness are forbidden. All these are prohibited because they tend to distract the minds of the jurors from the actual facts and real issues and create against the defendant a prejudice born of the fact that the District Attorney is recognized as a public officer who has apparently no interest in the case and who is at heart an altruist and interested solely in obtaining justice.

A study of the record in the instant case discloses that this defendant did not receive the fair and impartial trial to which every defendant is entitled. It also discloses that the prosecuting attorney went beyond the limits of non-partisanship and impartiality and attacked the defendant and the case with the virulence and venom of the nearly barbaric advocate who tilted in the lists for the case of his principal. But the age of defenders and trials by combat has long since gone. Our civilization at least in its Penal Law and procedure prides itself on having through evolution completely annihilated primativeness and barbarity. Yet occasionally, as here, our consciousness of civilization is pricked by ugly throw-backs.

Almost at the outset of the trial the Assistant United States Attorney makes clear his disposition. After an objection had been made he stated:

> "I do not mind your objecting but if it is an act to disconcert this witness you won't get away very long" (R. 151).

His quarrelling with counsel for the defense at the time is not only ludicrous but actually scandalous. That the

austere and dignified atmosphere of the court must have been disturbed by such actions is obvious (R. 172, 219-220, 222-223). His attitude is well displayed by this (R. 248):

> "Q. So you have the whole picture before you as he painted it for you?
> Mr. Singer: He did not paint anything. Stop the picture talk.
> The Court: Go ahead.
> Mr. Kamber: I withdraw the word 'paint'.
> The Court: You had better ask the question without the word 'paint'.
> Q. So he told you this entire story and you took it in for all it was worth?
> Mr. Singer: Let us not have any of that either.
> The Court: I will let that go."

And a short time later after a question had been asked and objection made defense counsel offered to withdraw the inquiry to save time; the Assistant United States Attorney replied:

> "Do not save time, save yourself" (R. 249).

And later:

> "Q. Did you tell this ex-convict——
> Mr. Singer: Let us not have that.
> The Court: We are talking about Katz.
> Mr. Singer: He is not the only ex-convict" (R. 249).

Jones' cross-examination (R. 410-418) consists of one long argument between the Assistant United States Attorney and that defendant.

Cross-examination of the defendant Rice too (R. 514-538) gave the Assistant United States Attorney fur-

ther opportunity to display his argumentativeness.

And during the defendant Berger's direct examination Mr. Singer continued his habit of interrupting:

> "Q. You have an automobile? A. A twenty-five hundred dollar car.
>
> Mr. Singer: That is a new defense. You do not need money.
>
> The Court: He can show the whole situation.
>
> Mr. Singer: That is a new defense." (R. 329.)
>
> * * * * * * *
>
> "Mr. Singer: What is that?
>
> Mr. Wegman: Never mind; I consent that it be stricken out.
>
> Mr. Singer: Never mind about striking that out. Let him go and tell how I know her; let us hear about it.
>
> The Court: What has that to do with Mr. Singer?
>
> * * * * * * *
>
> Mr. Singer: Is that all? I thought I was in that apartment with the gun.
>
> Mr. Wegman: There has been no suggestion of that altogether, and you know it.
>
> Mr. Singer: There might have been."
>
> (R. 340, 342.)

The persistent unfairness of the Assistant United States Attorney is clear on the cross-examination of the defendant Berger. Right at the beginning he purposely mis-states the defendant's testimony:

> "Q. The man who didn't have his pants on and was running around the apartment he wasn't there? A. No, Mr. Singer. Mr. Godby told me about it, if you want it, I will tell you, he told me 'If you give this man's name out, I will give you the works.'

Q. Give me the works? A. No, sir. Godby told me that.

Q. You are going to give me the works? A. Mr. Singer, you are a gentleman, I have nothing against you. You are doing your duty.

Mr. Wegman: You are not going to give Mr. Singer the works. Apparently Mr. Singer misunderstands you. Who made that statement?

The Witness: Mr. Godby says that.

Q. Wait a minute. Are you going to give me the works? A. Mr. Singer you are absolutely a gentleman, in my opinion, you are doing your duty here.

Q. Thank you very much. But I am only asking you are you going to give me the works? A. I do not give anybody such things, I never said it.

Q. All right. Then do not make the statement." (R. 350.)

His brow-beating of the defendant is seen throughout the case:

"Q. I wasn't in that apartment, was I? A. No, Mr. Singer.

Q. I didn't pull the gun on you and stick you up against the wall? A. No.

Q. I wasn't in this apartment at any time, as far as you know, was I? A. As far as I know, you weren't.

Q. You might have an idea that I may have been there? A. No, I should say not.

Q. I just want to get that part of it straight." (R. 351.)

And then concerning the defendant's pistol permit:

"Q. In this renewal for 1933 you had stricken out the fact that you wanted it on the premises but you wanted to carry it in your pocket? A. That is not true.

* * * * * * *

Q. I did it I suppose? A. I didn't say you done it Mr. Singer.

Q. I thought you did it, so here somebody was framed again? A. * * *"

(R. 380.)

Concerning a matter that had absolutely nothing to do with the defendant and the trial, the prosecutor was permitted to cross-examine the defendant viciously in what takes up six full pages of the record (R. 382-388), as to whether or not Mr. Singer had given Miss Wishnu his telephone number, as to the reason for his having done that, and as to whether or not Miss Wishnu had any connection with this case or whether she had been let off by Mr. Singer.

The Assistant United States Attorney, also unfairly and unnecessarily went into great detail concerning the relations of the defendant and Miss Talle, as to what he did at her apartment, how often he stayed there, whether he slept there over night, whether he had a right to indulge in what he did, and whether it degraded him. Clearly such facts had no bearing upon the issues of the case or upon the credibility of the defendant (R. 364-368).

The defendant had testified to making an effort to find out the name of the man who with Katz had been at the girls' apartment the night when Berger went there. Then the Assistant United States Attorney asked the defendant if Mr. Godby, the secret service operative, had been in the apartment. The defendant knew he had. He then asked:

"Q. You do not claim Mr. Godby had anything to do with these girls, do you?"

He then asked the some question concerning Agent Fitzgerald. The defendant insisted he couldn't swear for anybody else. The Assistant United States Attorney still persisted on the point:

> "Q. Do you include as those who may have been there, the Court and all the jurymen, and your own counsel?"

Defendant's attorney interfered, but the Court stated:

> "I am not going to stop him because the question includes the Court. I will let him answer it."

The predicament of the defendant is clear. His answer was obvious: "I should say not; that is ridiculous." But counsel would not leave that alone and insisted on following it up:

> "Q. It is ridiculous to include the Court, and the jury and your own counsel but it is perfectly feasible to include Mr. Fitzgerald, and Mr. Godby and myself. That is your answer, that is all. A. No."

Right thereafter the Court repeated to the jury:

> "He has answered that question, that it is none of you." (R. 391-393.)

At the end of this defendant's cross-examination the following took place:

> "Q. Now, Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that?
> A. I do, Mr. Singer.
> Q. You talked to me out in the hall? A. I talked to you?

Q. Yes? A. No.

Q. *You say you didn't say to me out in the hall yesterday, 'You wait until I take the stand and I will take care of you'? You didn't say that yesterday?* A. No; I didn't, Mr. Singer, you are lying.

Q. I am lying, you are right. You didn't say that at all? A. No.

Q. You didn't speak to me out in the hall? A. I never did speak to you outside since this case started, except the day I was in your office, when you questioned me.

Q. I said yesterday. A. No, Mr. Singer.

Q. Do you mean that seriously? A. I said no.

Q. That never happened? A. No, Mr. Singer, it did not.

Q. You did not say that to me? A. I did not. What do you want me to answer you?

Q. *I want you to tell me I am lying, is that so?* A. I told you that once.

Q. No question about that at all? A. No question about that." (R. 393-394.)

The Assistant United States Attorney's propensity for making statements injurious to the defendant and actually inadmissible in the guise of questions, is clear from the following:

"Q. Didn't you tell me, Mr. Wasserberger, and I am sorry you brought this up, but as you took the stand, you are going to be bound by it, *didn't you tell me that the only reason that you wanted to get those girls out for Berger was because you felt if you could get them out on bail they would not say anything about Berger?*" (R. 544.)

During the defendant's cross-examination too the Assistant United States Attorney, although there was no evidence to that effect, asked the following questions:

"Q. You never told us about the time Jones and you came up to the girls' apartment?"

And then followed it up:

"Q. *Didn't you tell me you brought Jones up there?*"

"Q. *I am lying?* • • •

Q. *Do you say now that you never told me?*" (R. 357.)

And later on:

"Q. Didn't you tell me up at the District Attorney's Office that it was your girl friend, Miss Siegel or Talle who had informed the police that you had a pistol permit and you had a criminal record?" (R. 362.)

It will be noted that in spite of all this no statement of this defendant was offered in evidence, for he did not make any such statement, and Mr. Singer did at no time attempt to take the stand to testify as to the conversations he had with this defendant.

In his summation, counsel for the Government, continued in the same manner in which he had persisted throughout the examination of witnesses. He opened with a malicious attack on defense counsel (R. 614-616). Then he, again, proceeded to inject statements of alleged fact which were not in evidence: "he seems to forget too that this man was arrested long before he ever heard of this lawyer • • •" (R. 618). He proceeds to accuse Berger, without foundation in evidence, of leading a dual existence, of having fooled his friends and asserting that the character witnesses knew nothing about this defendant (R. 621):

"But no, each and every single character witness called here testified that they didn't know anything

about Berger, because Berger, just like the last man, Rice, was leading a complete double life, Dr. Jekyll and Mr. Hyde, in the flesh before you, the two of them.

* * * * * * *

"Well, that is a part of his nature, that is a part of his life, to attempt to fool his own friends, and that is what the testimony shows here."

"Well, if they were (his social intimates) he certainly fooled them, and I know he won't fool you. This is the point, you see. Every argument must come back to the one point. He fooled his friends, and they all said so. Is he going to fool any of you?

Mr. Wegman: Now, if your Honor please, I ask that the District Attorney be instructed to correct that mis-statement of fact.

The Court: I do not think that kind of interruption should be made. This is argument, he is not stating the evidence. If you have any exceptions, you can take them at the close of the argument.

Mr. Wegman: There is no evidence that he fooled any of his friends.

The Court: Go ahead.

Mr. Singer: I say to you again that he fooled those friends. Not a single one of them knew about him, because if they knew what he was doing over there at West 57th Street, if they knew of his association with these thieves, the men that Kamber called thieves, the man that his own lawyer called a rat, do you think that these honorable men would have come here and given testimonials as to his good character? *You have got the right to assume, you have got the right to think that he fooled them,* and to say to yourselves, 'This baby won't kid me.'"

Then still more savagely, having repeated the incidents of the notary and pistol permit applications, he repeats with each breath the word "liar" and ends:

"And if what his own lawyer says is true, if a man lies in one matter he may lie in everything so throw out everything he says, and *throw Berger at last where he really belongs.*"

Although Berger had no connection with the passing of the bill on Mrs. Goldstein, and all the Government witnesses so agreed, Mr. Singer attacked her, his own witness, in an effort further to prejudice Berger, and into his argument again injected his alleged personal knowledge:

"Mrs. Goldie Goldstein takes the stand. She says she knows Jones, and you can bet your bottom dollar she knew Berger. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.' You know the rules of law. Well, it is the most complicated game in the world. I was examining a woman that *I knew knew Berger and could identify him,* she was standing right here looking at him, and I couldn't say, "Isn't that the man?' Now, imagine that. But that is the rules of the game, and I have to play within those rules."

* * * * * * *

"Now, she finally got to see Berger, somebody had to almost pick him up and throw him in her lap——

Mr. Wegman: If your Honor please, I have got to object to this. I object to counsel——

The Court: Mr. Singer, nobody picked him up and nobody put him in her lap.

Mr. Singer: I didn't say that.

Mr. Wegman: It is unfair to state that.

Mr. Singer: 'Stand up,' said I, and when he stood up she said, 'Yes,' and then tried to explain it, explain the reason why she had failed to identify him before. She said, 'Well, it looks like there was something different about him now and then.'

From that time on everybody was laughing when the statement was made, 'Did he have a moustache?' Nonsense! She knew him when she took the stand. *You must remember, Jones had been to see her after he had been released. Remember, you are not dealing with a lot of ignorant school children.* Isn't it peculiar that she couldn't identify him when she was over there? Doesn't that sound ridiculous to you? Use your brains, and you can find out what was behind the failure to identify him. *They weren't slipping anything over on me. I knew before the case was over she would pick him out or be a sorry lady.*"

* * * * * * *

"It was a pretty tough break that she had to identify Jones, and if she could have avoided it I believe she would have, and *she tried to avoid identifying Berger*——

Mr. Wegman: I object to that.

Mr. Singer: (Continuing)—but her luck didn't hold out.

Mr. Wegman: I object to that."

* * * * * * *

"Mr. Singer: Gentlemen, you make your own minds up as to why she couldn't identify him at first, and I won't attempt to encroach at all on your own opinion."

Among other facts not in evidence we note the Assistant United States Attorney saying:

"Oh, you have his good pal Berger, who was not only taking care of him in a business way, but also was taking care of him up at this apartment where there were some ladies of pleasure."

What more than this did the jurors need to hear from a quasi-judicial officer before convicting:

"It (reasonable doubt) means, 'I got a conscience, I got a job, I am on the jury and I swore an oath to be a good, honest juror. Am I satisfied in my mind that these men committed a crime? If I am I will convict them; and that is your reasonable doubt. Of course, if you didn't want to take the job as jurors you should have refused and said, 'I do not have the heart, I do not have the moral fibre or strength to judge my fellow man. I would rather duck the issue and leave it for somebody else.' But *you took the job, and I am going to hold you strictly accountable to your oath.*"

A summary finds that the Assistant United States Attorney in his zeal was guilty of almost every act of misconduct which has many times been proclaimed error:

"Altercations between counsel, including imputation as to veracity, interjection of prejudicial matter by way of remarks during the trial, asking incompetent questions, merely for purpose of prejudice, the improper browbeating of witnesses, * * * improper argument to the jury," 26 Ruling Case Law 1022.

"Persistence of the prosecuting attorney in asking improper questions in order to prejudice the jury may amount to such misconduct as to require a new trial." (Citing: *State* vs. *Greenland*, 125 Iowa 141; *Baldwin* vs. *State*, 11 Oklahoma Criminal Reports, 228; *State* v. *Roscon*, 119 Iowa 300) Corpus Juris, Vol. 16, p. 1143.

"A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. * * * Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit * * * To bring forward in argument an assertion of fact * * * is to become a witness; and to be a witness without being subjected to cross-examination is to

violate the fundamental principle of the Hearsay rule." 3 Wigmore Evid. 837.

"The same general principle governs the putting of questions to witnesses. The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question." *Id.* 850.

That the misconduct of counsel for the prosecution during the trial prejudiced the defendant and his case so as to deprive him of a fair and impartial trial is clear. *Johnson* v. *U. S.*, 131 C. C. A. 613, 3 Wigmore Evid. Sec. 1808; *Graves* v. *U. S., supra; Hall* v. *U. S. supra; Wilson v. U. S. supra.*

Upon these matters the court below in its opinion said:

"It is indeed true that this officer failed in moderation and good taste, we might have been better content had the trial judge seen fit to keep him more closely in hand than he did" (R. 755).

It termed the actions of the prosecutor an "abuse of his position." (R. 755). It further said:

"More can be said as to these questions which he put to Berger, implying that Berger had made declarations to him, contradictory of what he swore to on his direct. That common device is an abuse which ought to be strictly controlled at times even at the cost of a mistrial if need be. But again, it would be extravagant now to reverse the conviction on its account, for it is fantastic to suppose that it substantially determined the outcome. If it colored the whole as perhaps it did, and as it was certainly intended to do, the shade that it added we can scarcely detect, today when mere possibilities

do not interest us as they did our forerunners; we demand more tangible evidence that damage has been done."

With the proof against the defendant admittedly so weak, the actions of the prosecutor became important. It hardly seems credible that the conviction would be based on the facts. The only proper conclusion is that the attitude of the Assistant United States Attorney and the atmosphere he created aroused prejudice against the defendant, resulting in the verdict.

The presumption is that error produces prejudice, and it is only when the fact so clearly appears that an error challenged did not prejudice and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. *Smith* v. *Shoemaker*, 17 Wall, 630, 639; *Deery's Lessee* v. *Cray*, 5 Wall. 795; *Moores* v. *Citizens' National Bank of Piqua*, 104 U. S. 625, 630; *Gilmer* v. *Higley*, 110 U. S. 47; *Boston & Albany R. R. Co.* v. *O'Reilly*, 158 U. S. 334; *Crawford* v. *United States*, 212 U. S. 183.

The view of the Circuit Court below is thus contrary to the rulings of this Court and the evident weight of authority. Further, by its decision, the court below has sanctioned such a departure from the usual and proper course of procedure as to call for the exercise of this court's power of supervision.

CONCLUSION

It is submitted that the decision of the Circuit Court was erroneous in determining the within case in a manner in conflict with the decisions of other Circuit Courts and

the weight of authority; in condoning the departure from the usual and proper course of trial procedure. The decision is grossly and manifestly unfair and improper and calls for the exercise of this Court's power of supervision.

The judgment should be reversed and the indictment dismissed, or a new trial granted.

February 18, 1935.

Respectfully submitted,

NATHAN D. PERLMAN,
Attorney for Petitioner,
Defendant-Appellant,
Office and P. O. Address,
475 - 5th Avenue,
New York City, N. Y.

Of counsel,

SYDNEY ROSENTHAL,
and
SYDNEY S. SNYDER,

(Both of 10 Court Square,
Long Island City, N. Y.)

APPENDIX

Section 88 (Criminal Code, Section 37) Conspiring to Commit Offense Against United States

If two or mor persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879 c. 8, 21 Stat. 4; Mar. 4, 1929, c. 321, Sec. 37, 35 Stat. 1096.)

Section 263 (Criminal Code Section 149) Counterfeiting National Bank Notes

Whoever shall falsely make, forge or counterfeit, or cause to procure or be made, forged or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be, in imitation of the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business knowing the same to be falsely made forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering, any such circulating notes, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any

such banking association, knowing the same to be falsely altered or spurious, shall be fined not more than $1,000 and imprisoned not more than fifteen years. (R. S. 5415; Mar. 4, 1909, c. 321, Sec. 149, 35 Stat. 1115.)

SECTION 265 (CRIMINAL CODE, SECTION 151) UTTERING FORGED OBLIGATIONS

Whoever, with intent to defraud, shall pass, utter, publish, or sell or attempt to pass, utter, publish or sell or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned ~~not~~ more than fifteen years. (R. S. Sec. 5431; Mar. 4, 1909, c. 321, Sec. 151, 35 Stat. 1116.)

TESTIMONY

The Prosecution

GOLDIE GOLDSTEIN testified that in the month of January, 1934, she had a concession in the Parisian Dance Hall at 1531 Broadway, New York, selling soft drinks and sandwiches and coffee. She saw Jones there many times. He came down to see her on a business proposition (R. 50). Jones came to her about 2 A. M. of a Thursday morning about the 4th or 5th of January and said he would then complete the purchase of her concession (R. 54). They had some drinks and she took him to her home to change a $100 bill he tendered her (R. 55). Jones said he had won it from Harry, a bookmaker on 43rd Street (R. 58). She could not identify the appellant Berger as one of the men who had at one time been with Jones until his counsel had him stand up (R. 59).

No one of the men, not even Berger had told her what his business was (R. 53, 59). But after prodding and leading by the United States Attorney she stated she *believed* he told her he was a real estate man from Queens, and that he was an attorney for Jones; that he was a real estate lawyer (R. 59). She had known Jones for about three months (R. 60). *When Jones changed the bill he did not have anyone else with him.* She believes Berger was there with Jones once or maybe twice. *It was certainly more than a week before she got this $100 bill from Jones* (R. 63).

NICK CAMROS, a waiter at the Parisian Dance Hall in January, testified that he saw Berger there, once or a couple of times (R. 65). He did not see Berger at the place the night before and *it was two weeks before then that he saw Berger* (R. 66).

SAMUEL BERGER testified that he owns the Lindy Clothes Shop where he sells men's clothes. Jones came there

alone on Thursday, January 4th, about 2:30 P. M. to buy a suit. He picked out a suit and gave him a $100 bill (Government's Exhibit 2). He gave Jones $75 in change (R. 70-73). A suit of clothes, the money and a letter of apology from Jones' wife was left in his store the following Monday morning (R. 76).

VINCENT D. TREANOR, a member of the Police Department of the City of New York, testified that he took Jones into custody on January 5th. He asked Jones where he got the counterfeit bill. Jones said he got it off a bookmaker on Broadway and 43rd Street. He searched his house and turned his pockets inside out but found no other counterfeit money (R. 79).

JOHN A. KETT, an operative of the United States Secret Service, testified: Jones told him he received Government's Exhibit 1 on Thursday, January 4th, from a bookmaker on 43rd Street and Broadway (R. 82). He gave him the names of horses and tracks he had played (R. 83). He described the bookmaker. He said he had not passed any other $100 bills. Jones later told him that he had not mentioned the bill given to Samuel Berger. He thought it was a good one (R. 85). He made a written statement and signed it in the presence of Agent Johnson and Kett. He gave Jones his card with his telephone number to call him if he saw the bookmaker Harry. Jones phoned him on Friday night, January 6th and said that he had run across the bookmaker at Broadway and 43rd Street, and had had an argument with him and tried unsuccessfully to have him arrested (R. 88).

MORRIS L. TUROFF and HARRY TUROFF, his son, identified Government's Exhibit 2 and on cross-examination testified as to the good reputation of the defendant Harry Berger (R. 89-96).

VITOLA PICCONE, residing at 414 Atkins Street, Brooklyn, testified she advertised a diamond ring for sale. One man came to her house to look at it. She described the man and thinks she could recognize him if she saw him (R. 89-99). Katz is not the man (R. 102). She sold the ring to the man for $325 receiving sixteen $20 bills (Government's Exhibit 4) and one $5 bill (R. 100-101).

NICHOLAS PICCIONE, her husband, testified that he knew the stone and the ring that had been sold and that he saw it again two days later when a fellow by the name of Harris, at the jewelry exchange, had offered to sell it to him (R. 104). He did not report to the police that he got the ring back (R. 105).

JESSIE HARRIS, a diamond setter in the jeweler's exchange in New York, testified he does not know any of the defendants (R. 107). He had gotten a ring from a man, named Stern, whom he had never seen before, but who was recommended to him, by a certain fellow he deals with and who gives his cards around. The man left the ring to be sold by him as a broker. He asked Piccione what the ring was worth. Piccione told him the ring was his, so he did not demand it back from him. Stern telephoned and he told him what had happened about the ring. Stern said he would be down to straighten it out (R. 110-112).

EDNA NAPP, an employee of the Nat Lewis Haberdashery Shop, testified. She knows the defendant, Jack Rice, who had been a customer for five years (R. 116, 118). At Christmas time she waited on him and he paid for the merchandise with a $100 bill (R. 116, 117).

NAT LEWIS testified that Rice had bought from his store frequently during the last four or five years (R. 119). A few days after Christmas he phoned Mr. Rice and told him that he would like to see him with regard to a $100 bill which had been returned by the bank as counterfeit. Rice told him if he thought he had given him the $100

bill he would make it good. Rice paid him moneys on the bill (R. 120). He could not identify the bill. (Government's Exhibit 5 for identification.) (R. 122.)

BERNARD ZIMMERMAN, lawyer testified that Katz came to see him about a ring which had been advertised for sale by his brother. He arranged to sell the ring for $570.00 receiving payment in six one hundred dollar bills. (Government's Exhibit 6 for identification) (R. 124-128).

MARY DALTON, employed by Dr. Leo Michel, testified that on December 19th, Katz was examined by the doctor and paid her with a bill identified by her (Government's Exhibit 7 for identification) (R. 129).

Before Jack Katz testified the Assistant United States Attorney stated his agreement with Katz; that if Katz would testify truthfully, such truthfulness to be gauged by testimony previously given, he would accept a plea to the conspiracy count, and subsequent to the disposition of this case nolle the other counts against him; that he would aid to obtain a separation from the other defendants during trial and after sentence (R. 132-134).

JACK KATZ then testified as a witness on behalf of the Government. He was convicted of the crime of forgery, was sentenced to a term of imprisonment at Sing Sing Prison, and is at present out on parole on that offense (R. 135). He has also been convicted in Philadelphia for Petit Larceny (R. 136). He saw Lee outside of the Hotel Victoria around March, 1933. As a result of that talk, he later met Jack Rice. He was in Rice's office a couple of dozen times. There was an engraving business being carried on there. They asked him to sell beer labels to breweries on a commission basis. Then he got into trouble and went to Sing Sing for violation of parole (R. 138-141). He came out on November 15th and went in

to see Rice again. He told him he had an idea where they could make some money taking ads out of the newspapers of people advertising for rings and different things and he could go over and buy the rings, paying with counterfeit money (R. 143). He went to the office of Bernard K. Zimmerman and bought a diamond ring. Rice had picked out the ad and given him the six $100 bills. He gave the six bills to Zimmerman (R. 144-145). He gave the ring to Rice. Also at Dr. Michel's office he passed a $100 counterfeit bill which he had received from Rice (R. 146). He never got any counterfeit money from any one but Rice (R. 107). *None of the defendants except Lee was ever present when he received money from Rice* (R. 453-454). At the appointment made with Rice for Roth's Restaurant he had told him to bring a large bottle of ginger ale with him and this was understood between them to mean a $100 bill (R. 155). This meeting in Roth's Restaurant was in January around the middle of the month. Prior to that he had met all of the defendants. He had met Miss Talle and Miss Molnar in a room in the Wellington Hotel that belonged to these two and a third girl. The girls moved to an apartment in the Park Vendome, 350 West 57th Street (R. 156-157). He met Berger there frequently. Berger spoke to him first about the money. Their first conversation was sometime in the latter part of December, before Christmas. Berger had another boy friend of his there. Berger said that one of the girls told him that he, Katz, had counterfeit money. He asked to be shown one of the bills. Katz got one of the $100 bills and showed it to him. Berger said it looked pretty good. Next he was introduced to Jones in the presence of the two girls Talle and Molnar. Jones asked if he could give him a few of the bills. He called Berger aside and told him he did not know the

fellow and asked what type of man he was. Berger said he was O. K. and not to worry about him; Jones would never say anything. Katz spoke to Jones who said he would pass the bills in hockey games in Madison Square. He could get rid of them on the bookies there (R. 158-159). The following night he came back there. Berger and the girls were also there. They went *into the bath room* and he gave Berger the bills as he said he did not want to hand them to Jones. These four $100 bills he had already received from Rice. He gave the bills to Jones and received $100 (Government's Exhibit 1 and 2) (R. 160). He testified that, using Government's Exhibit 4, he had bought the ring from Mrs. Piccione and turned it over to Rice to be disposed of (R. 166-170). He admitted he had gotten quite a few suspended sentences and: *"I was arrested in every city"* (R. 173). His *record showed many convictions* (R. 180-186, 505). From 1921 up to 1933, he had carried on his criminal acivities (R. 183).

He first informed the Secret Service men that he had dealings with Berger some time in January, on January 15th. This was after Mr. Berger had gone to the girls' apartment about 4 o'clock in the morning and found him there with another man (R. 202). He did not deny giving a message to one Samuel J. Siegel, an attorney, to carry to Harry Berger's attorney saying he was sorry he brought him into it; that he knew Berger was not guilty and he did it because he was sore at him and thought he was fooling around with his wife (R. 207). Upon examination by the Court, he admitted that Commissioner O'Neil stated he was crazy (R. 212). He stopped being friendly with Berger the night that Berger broke into the apartment when he, the witness, was there with another man (R. 220). *He is not friendly with*

Berger and does not feel very good towards him (R. 223).

ROBERT L. GODBY an operative of the United States Secret Service testified: He had met Katz on January 18th at the office of the New York Daily News (R. 226). At his suggestion, Katz phoned Rice in the office of the New York Daily News and he listened in on the other extension and heard the entire conversation. He and other agents were at Roth's Restaurant when Katz met Rice and Lee pursuant to the telephone conversation. Rice told Katz not to call him up any more, things were kind of "hot" and told him to stay away from the office (R. 231, 254). He was present when Berger was questioned. Berger admitted knowing Jones, that he had twice been with Jones in the Parisian Dance Hall in Manhattan, that he had only once taken Jones to the apartment on West 57th Street. He denied all knowledge of counterfeit bills. He said his only relation with Jones was in assisting him to purchase the concession at the Parisian Dance Hall (R. 233-234). Katz was introduced to him by Mr. Connelly an investigator for the New York Daily News. He knew Connelly very well. Connelly told him that Katz was passing counterfeit notes and he introduced him to Katz stating that Katz had valuable information for the Government. He knew Katz was an ex-convict (R. 245-256). Though he is in charge of Elmira which is outside of the New York District, Connelly had called him and given him this tip and in accordance with this tip he came down to New York and interviewed Katz after speaking with Connelly (R. 247). He continued to meet Katz practically every day or so (R. 259). Katz had told him that the plates for the counterfeit bills were in Rice's office. They searched the office but they did not find them there (R. 260). A:

the time he spoke to Katz no complaint had been made in his office. Katz told him that Berger had tried to put him (Katz) on the spot (R. 266). He did not go out to arrest Berger but called him on the telephone. When Berger came down to see him, he searched him and found no counterfeit money on him (R. 267). *No one except Katz had ever seen Berger with any counterfeit money or heard of him passing it* (R. 267).

JOHN J. FITZGERALD, a secret service operative, testified that all of the bills (exhibits) were counterfeit and were struck from the same plate (R. 276-277).

The Defense

ARNOLD GROSS and WILLIAM GLATZER, attorneys, DAVID DINNERSTEIN, MILTON ISTRICK, and RICHARD EPSTEIN, real estate brokers, JULIUS GERBER, public accountant, and BENJAMIN ANTIN, attorney and former State Senator, testified to the good reputation and character of the defendant Berger. Dinnerstein said Berger collected for him in two months time between $12,000 and $15,000 (R. 285-324, 303).

HARRY BERGER testified on his own behalf. He is thirty years old and is engaged in the real estate business at 7918 Woodside Avenue, Jackson Heights. He has been doing business in that community since 1926. In December 1924 he was arrested in Brooklyn by a policeman chasing a man who had shot at some person. When he heard the shooting he ran around the corner. He was arrested but nobody was able to identify him. He stayed in Raymond Street Jail for about eight months. When he was brought before the District Attorney at least fifteen times, they tried to have him plead guilty, but he refused. Finally on the advice of his attorney he took a plea on the recommendation that he would receive one year in jail and be credited with the eight

months already served. He accepted the plea and was sentenced to Sing Sing for one year. In December, 1925 he was paroled (R. 324-325). He had never had any trouble before that or since until this difficulty by reason of his acquaintance with Jack Katz (R. 326).

Berger first met Jack Katz around the middle of December, 1933. Jones was in charge of a luncheonette and soda fountain. Berger often had his lunch at the soda fountain and that is how he got acquainted with Jones. He has built and managed property, collecting the rents, making leases, etc. At one time he collected over $15,000 in cash but his monthly collections averaged $5,000 (R. 327-328). He has not had any particular need of money during the past several years. He has a $2500 car, he associates with some prominent people, well off financially, and enjoys their friendship. He is not married (R. 329). He knows Audrey Siegel, a registered nurse, graduate of Mt. Sinai Hospital, very well. He used to visit her apartment quite frequently (R. 330).

He met Jack Katz and the latter's wife in Audrey Siegel's apartment, at a housewarming. He has never had any business dealings with them. He did not know at the time that Katz was an ex-convict. When he found that out he insisted Katz leave or he would not come there any more (R. 331).

The day after Christmas Katz and his wife had an argument. Katz had no place to go so Miss Siegel allowed him to stay there. Two or three days later Audrey Siegel called him up and asked him to come to the apartment. He went there and she asked him if it was true that he was on parole. She said that Mrs. Katz went down to the parole officer and told him that Katz had beaten her up at Audrey Siegel's apartment and she

wanted him sent back for violating parole; also that Harry Berger was there. The officer was supposed to have told her he was on parole. The next day he went down to Mr. Doyle, the parole officer and explained him the circumstances. Doyle said he had not said anything about it, that he hasn't even got a record of his being on parole. To prove it he telephoned Mrs. Katz in his presence. But she wasn't in so he made an appointment for Monday morning. At the appointment Mrs. Katz denied everything Miss Siegel had told him, but said Audrey Siegel told her he was out on parole. When he got back he called up Miss Siegel and told her to force Katz to stay out of the apartment or he would never see her again. He never had dealings of any kind in a business way with Jack Katz. He never knew Katz was handling counterfeit money (R. 332-337).

In the early part of December Jones had called him at his office, said he would like to see him as he had some business to take up with him. Jones told him that a proposition was offered to him of a soda fountain and luncheonette in the Parisian Dance Hall. He went with Jones to look at the place. He spoke to a man representing himself to be the owner and he agreed with the suggestion to purchase the place for $1500. Negotiations were started. The owner wanted $300 a month and $300 security. This was all before Christmas. He was never back there after that. He has never seen Goldie Goldstein from that day until he saw her sitting in court (R. 337-339).

On January 13th Miss Wishnu who lived with Miss Siegel and Miss Molnar called him and said that Miss Siegel was expecting company and if he wanted to be surprised he should walk in on them. About 2:30 or 3 o'clock in the morning he stopped in at the apartment

at 57th Street. He rang the bell several times and he heard a noise in the apartment. Finally the door was opened and a man told him to come in. He walked in and the man pulled out a gun and asked him if he was Harry Berger, asked him if he had a gun. He was told to throw up his hands, and was searched. The man was from the Federal Department or the United States Attorney's office. He was there only in pants, no shoes and no undershirt. Jack Katz was there the same way. The davenport was down with room for at least four to sleep. Miss Siegel and Miss Molnar were there in their kimonas sitting up in bed. Champagne and ale bottles were all about, liquor was all over the place (R. 341).

He complained to Miss Siegel but she said he was going out with Katz's wife so why shouldn't she have a good time. He denied it but the man with the gun told him to have a seat while he got dressed. Then he took him downstairs and told him to forget about everything. Jack Katz was present at the time this remark was made by Audrey Siegel (R. 343). Two days later an inquiry was begun as to his pistol permit. The Grand Jury dismissed the charge (R. 344).

He received a call that a Mr. Price of the Daily News Building, said that if he didn't communicate with him at once the newspapers would be full about him. He went up to the Daily News and complained about it but they said they had no Mr. Price, but would check the call for him. Upon doing so they found that it was Jack Katz and that he was working with an Editor from the Daily News by the name of Collins about a certain man who was stealing the affections of Katz's wife (R. 346). Mr. Cassidy of the Daily News said that Katz had annoyed him to death to give him publicity in the paper. And

while he was at dinner with Katz and Captain McDermott, Katz told him and McDermott that unless he arrested Harry Berger he would go to see the District Attorney. It was the following day that Captain McDermott ordered Berger to bring in his pistol permit (R. 346).

About February 5th or 6th Miss Siegel called his office and stated that she was at the Custom House with Mr. Godby and wanted to talk to him. He telephoned Godby and Godby said it was about nothing at all but he wanted to ask something about Jack Katz and counterfeit money. Berger said he knew nothing about it but he would go down there anyway. There he met Godby, Miss Siegel, Molnar and Jack Katz. Godby asked him what he knew about the counterfeit money. He laughed, and asked if he was being kidded. Godby said it was a serious thing. Berger said he knew nothing about counterfeit money, had never seen any and never handled any and knew nothing about it. Godby said he would hold him and Jack Katz and send the two girls home, which he did (R. 347, 348). In Godby's office Godby, Kett and another man were standing around. Katz said to him: "Harry, were you fooling around with my wife? I want you to tell the truth." He said, "Jack, why do you think I would fool around with your wife?" Katz said, "Well, I've been told that you were fooling around with my wife, that is why I am out to get even with you" (R. 349). Katz told him that that was the reason why he was here but that he was going to deny the statement that he made against him and was not going to testify to that when he got to Court (R. 349).

Jones was never at the girls' apartment (R. 357). He did not tell Mrs. Goldstein he was a lawyer. He was at the Parisian Dance Hall merely to look over

the business and find out if it was a paying proposition (R. 361). Katz never mentioned Jones' name to him. He didn't know he knew him. Jones is not his friend. He has known him for three and a half years (R. 367). He asked Jones where he got the counterfeit money. Jones told him he had made bets on horses and hockey with Jack Katz and another man, known as Harry (R. 368). He didn't put anything about his conviction on the application for the pistol permit because he didn't want Lieutenant McGovern, head of the detectives, and Captain Keene, captain of the precinct, to know about it. They were friendly with him (R. 372). That had nothing to do with his brokerage license but it was the only way he had of making an honest living. He did not know that the failure to state his previous conviction was a crime (R. 373). He also said nothing about it on his application to become a notary because he wanted to conceal his past (R. 374).

EDWARD JONES, a defendant, testified that he intended to buy Mrs. Goldstein's concession and he went there for the purpose of watching the business, to see if it was paying. During the conversation he bought some drinks for $3.50. He asked if he could pay her the following night as he had only a $100 bill and a few cents with him. She told him she would gladly change the bill if it was good. He took the bill out and showed it to several people there and it was believed to be good. She took him then to her house and got change. She then gave him $96.50 good money. He had known Mrs. Goldstein for about three months at that time. He had seen her about three times a week during that time (R. 398-399). He stayed at her house all night till about 10 o'clock Friday morning, when he went to his place of business and the lady told him the secret service men were there,

said that he gave a counterfeit $100 bill and had left his card for him to get in touch with him. This was Agent Kett. He called Mrs. Goldstein and told her to meet him in half an hour and go to the secret service department with him. When he went home to get his raincoat, since it had started raining, he found Agent Kett there. When he asked him where he had gotten the bill he told him he had gotten it from a bookmaker with whom he had placed several bets on horses for the previous two weeks (R.339). Kett told him if he saw the bookmaker and he had counterfeit bills to call him at home (R. 402).

He went to New York that Friday night and saw the bookmaker. The latter told him that he never had a counterfeit. He said to bring anybody he wants to see him. He called Kett while with the bookmaker. Kett told him not to bother him any more about the case (R. 402). As for the bill which he had given to Berger the storekeeper, it happened that Thursday afternoon, around 1:30 he had placed a bet and after being paid off, went down to Mr. Berger's store about 3:30, after the bank was closed. He had taken some of his wife's money to make the bet and he had to get change in order to replace the money without her knowledge. As he needed a suit he went to Berger's for the suit. He went back to the store about 6 and told the clerk that if the suit was ready he would take it because he wanted to go to the hockey game at 8:30. The clerk got the suit for him and gave him the change from the bill. He took the suit and went home. That night he went to the hockey game, came out about 11:30 and went to Mrs. Goldstein's place, where he gave her the second bill. He received both of these bills from the same person, at the same time (R. 404, 405).

He had given the bookmaker about $60. It was worked on a flim-flam proposition. You don't make your own selections on the horses. The runner for the bookmaker whom he found later to be Jack Katz had induced him to bet in this manner (R. 406-407). At the time he passed these bills he thought they were good. He has never been in any apartment with the defendant Berger; he never knew anybody connected with this case except Berger; he had never seen the other people until he was brought into the case about two weeks ago. He had never been introduced by Berger to Katz; he never saw Katz hand Berger four $100 bills; Berger did not turn any bills over to him (R. 408-409). He never heard of Harry Berger having anything to do with counterfeit money (R. 449).

ELMER STAHLNECKER who had office space with Rice, testified he never saw Katz at the office. He also, with ETHEL B. MAHNKEN, GEORGE MASCHKE, PHILIP AARON and HENRY MCALEENAN testified that a jewelry engraving business was carried on by Rice at the office.

Henry McAleenan, Chas. J. Klauberg, Vincent Abbott, Charles E. Muniz, Jr., and Raymond Demarest testified as to the good reputation and character of Rice. McAleenan and Abbott also affirmed that Rice had done much work for their firms (R. 450-599).

JACK RICE, one of the defendants, testified. He has been in the jewelry engraving business since 1930. He denied ever having seen any of the counterfeit bills placed in evidence except the $100 certificate, Government's Exhibit 5 (the Nat Lewis Bill). (R. 510). He saw that in Mr. Lewis' store after Mr. Lewis had telephoned for him to come in. Lewis said he had given it to him several days ago. Rice did not think so, but since it was believed that he had passed it, agreed to make it good. He gave

him $50 at the time, which was practically all the money he had in his pocket. He took this bill, showed it to quite a few people, a Mr. Simmons (corroborated by John E. Simmons R. 585-587), Mr. Simmons' cashier and several people around there. Late that afternoon Lewis called and asked him to return the bill. He had to return it to the bank. Rice did that. He gave Mr. Lewis another $25. He has done work for Lewis. Lewis was a customer of his and trusted him with merchandise (R. 508-513).

On cross-examination he admitted he knows Katz, he met him on a few occasions. He met Katz at Roth's Restaurant after a telephone conversation. But Katz had not said to him to bring a large bottle of ginger ale with him (R. 515). The only dealing he had with Katz was that the latter had given him an emerald for mounting. Katz had told him that this was his wife's (R. 536).

HERMAN WASSERBERGER testified that after Berger had pleaded before Judge Inch he came down to the court in connection with re-writing the bonds. He refused to write the bonds and he got permission to go into the pen to explain why. During an argument with Berger and the two girls, *Katz said, "Go on and bail them out. They had nothing to do with this case anyway."* It was in reference to all three of them, Harry Berger and the two girls (R. 541-542, 547).

REBUTTAL

JOHN A. KETT testified in rebuttal that he did not hear Katz say to Berger that the reason he brought him into the case is because he thought he was fooling with his wife, and that when he got to the court he would not testify against him (R. 550). At the secret service office he

heard Berger say that he brought Jones up to the apartment where the girls were to introduce him to Katz (R. 551). Berger came in voluntarily pursuant to a telephone call (R. 556). *When a defendant makes any statement or admission it is his duty to reduce it to writing immediately. He did not reduce to writing Berger's so-called statement. Nobody did* (R. 556).

ROBERT L. GODBY testified he did not hear Katz say to Berger he wanted to know whether he had been fooling with his wife. Berger said he brought Jones up the girls' apartment to introduce him to Katz. When he questioned Berger he found that he was a real estate broker. He asked him how he could get a license when he had a conviction for a felony. He said he must have committed perjury to get the license. That since his father has charge of that in the State Department he decided to notify his father (R. 568, 569). He had said Katz told him he met Berger in Sing Sing (R. 266) but after being shown that Berger was out of Sing Sing in 1925 while Katz was in California and Katz didn't go to Sing Sing for the first time until 1929, he inclined to lose all recollection (R. 577-578).